Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

JUANA MUNIZ, JUANA MUNIZ for and
on behalf of EDNA MUNIZ and EDNA MUNIZ,

Plaintiffs and Appellants,

Vs.

SOLANO COUNTY,

Term,
Oct. 7, '96

Respondent.

_____/

PETITION FOR WRIT OF CERTIORARI
FROM THE SUPERIOR COURT OF CALIFORNIA
BY JUANA MUNIZ and EDNA MUNIZ
PLAINTIFFS and APPELLANTS BELOW

Paul C. Rosenthall
3050 K Street Ste. 400
W.A., D.C. 20007
(202) 342-8485
Attorney For Petitioner

85 pp

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I. QUESTIONS PRESENTED FOR REVIEW

Procedural Due Process And The Back door Judgment

Defendant municipality in a wrongful death action brought a motion for a summary judgment of dismissal of the action. The motion contested but granted by trial judge's order. After the order, but before the judgment, plaintiffs duly filed and served a motion and notice of motion for reconsideration of the order. Defendant, without giving any notice or opportunity to plaintiffs to object, then solicited an obtained the trial judge's signature on a judgment form prepared by defendant. The trial judge was not then aware of plaintiffs' pending motion for reconsideration. Thereafter, the trial judge grants plaintiffs' motion for reconsideration for purposes of hearing of arguments. But, defendant interposes an objection that the trial judge divested itself of jurisdiction to hear plaintiffs motion when the judge signed the judgment. The trial judge subsequently ruled on plaintiffs' motion for reconsideration and by order denies the motion. Plaintiffs appeal from the order granting summary judgment and the

court's denial of her motion for reconsideration of the order. The appeal is dismissed for "good cause appearing" on defendant's motion to dismiss the appeal. defendant argued on appeal that plaintiffs' appeal was filed untimely late dating from the date of judgment. Plaintiffs argued that they did not appeal from the judgment but rather from the orders, and that the trial judge correctly disregarded the judgment as improvident and inadvertent. THE ISSUE: **Was the solicitation of the judgment without notice or opportunity given to plaintiffs to object when their motion for reconsideration was duly pending before the court a denial of procedural due process under the Fifth and 14th Amendments to the U.S. Constitution?**

II. BASIS FOR JURISDICTION

(i) Date Of Entry Of Judgment Or Orders Sought To Be Reviewed:

On January 9, 1997 the First District of the California Court Of Appeal entered the following order, to wit: "Good cause appearing, respondent's motion to dismiss is granted and this appeal is hereby dismissed." The court gave no further opinion. The herein petitioner timely filed a petition for rehearing, which was answered and replied to in a timely manner. Then on January 30. 1997 the First District of the California Court Of Appeal entered the following order without further opinion, to wit: "The petition for rehearing is denied." The herein petitioner duly and timely filed a petition for review with the Supreme Court of the State Of California, which is the state court of last resort. On April 10, 1997, by order of the Chief Justice of the California Supreme Court the Court granted itself an extension to May 19, 1997 to either grant or deny review. Then on April 23, 1997 the

Supreme Court denied the petition for review without opinion. The order became final upon its entry and there is no right to a rehearing.

(ii) Statutory Provisions Conferring Upon The U.S. Supreme Court Jurisdiction To Review On A Writ Of Certiorari The Judgments Or Orders Herein In Question:

Title 28, Section 1257 (a), United States Codes, provides that final judgments rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution" of the United States.

Rule 13, subsection 1, of the U.S. Supreme Court Rules, provides that a petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely filed when it is filed with the Clerk within 90 days after entry of the order denying discretionary review. This petition is filed within 90 days after entry of the order denying

discretionary review by the California state court of last resort.

Rule 10(c) of the U.S. Supreme Court Rules, provides that the Supreme Court may grant review on a writ of certiorari where a state court has decided an important question of federal law that has not been, but should be, settled by the Supreme Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court.

Petitioners contend in this petition that when the First District Appellate Court of California dismissed their appeal for "Good cause appearing," and when the California Supreme Court denied their petition for review, said state courts by necessary implication decided an important federal question in a way that conflicts with relevant decisions of the U.S. Supreme Court, or in the alternative said state courts decided an important federal question that has not been, but should be, settled by the U.S. Supreme Court. In the consequence the petitioners were denied a right, title, and privilege guaranteed under the

Constitution of the United States.

III CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

"No person shall...be deprived of life, liberty, or property, without due process of law." FIFTH AMENDMENT TO THE U.S. CONSTITUTION.

"nor shall any State deprive any person of life, liberty, or property without due process of law." FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, Section 1.

IV STATEMENT OF THE CASE

In this matter the plaintiffs/petitioners, surviving wife and minor daughter (Hereinafter at times referred to as "MUNIZ", or collectively as "Mrs. Muniz"), appealed from a trial court order granting defendant COUNTY OF SOLANO's (Hereinafter referred to as "Municipality") motion for a summary judgment of dismissal of Mrs. Muniz' action for damages for the wrongful death of her husband and two minor

children. The trial court's order granting the Municipality's motion was entered on June 25, 1996. Six days later, on July 1, 1996 and before any judgment was issued on the order, MUNIZ timely filed and served a motion for reconsideration of the court's summary order pursuant to provisions of Section 1008 of the California Code Of Civil Procedure. The motion was scheduled to be heard 29 days later, on July 30, 1996.

On July 10, 1996, nine days after Mrs. Muniz filed and served her motion for reconsideration, while said motion was pending, the Municipality stealthily went into court and tendered a judgment for to the trial judge for signature without giving any prior notice of this submission to MUNIZ.

The court reflexively signed the judgment form on that date which was entered five days later on July 15, 1996. Notice of entry of judgment was finally served by mail by the Municipality on MUNIZ on July 18, 1996. This was the first actual knowledge and notice that MUNIZ was given that a

judgment was solicited or entered in the action.Subsequently, on July 29, 1996, 14 days after the entry of judgment, the trial court considered and granted, in a tentative ruling, Mrs. Muniz' motion for reconsideration for purposes of hearing of arguments. Arguments were set to be heard on October 1, 1996, a sufficient time ahead for preparation of proof and argument. But on July 30, 1996 the Municipality appeared in court on the tentative ruling calendar and interposed the objection that the trial court lost any jurisdiction to hear Mrs.. Muniz' motion for reconsideration because judgment had been previously entered on July 15, 1996. The Municipality argued that once judgment had been entered the trial court lost the power to rule in the case, and that MUNIZ' remedy was to appeal. MUNIZ argued in a jurisdictional brief addressing the issue and filed at the request of the court, that: (1) in view of the lack of notice to MUNIZ of the solicitation of judgment, and (2) in view that MUNIZ' motion for reconsideration of the court's order granting summary judgment was duly filed and pending (and not yet considered) at the last time the judgment as improvident and inadvertent and proceed to rule on

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court's order granting summary judg
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MUNIZ' motion for reconsideration.

On September 27, 1996, 58 days after the July 30, 1996 hearing of objections, the trial court did exercise its jurisdiction and ruled on Mrs. Muniz' motion for reconsideration. The court ordered that "The Plaintiff's Motion For Reconsideration is denied," and further ordered, that "The court's prior order granting the Motion For Summary Judgment is confirmed." The trial court made no reference to the improvident judgment, ignoring it instead. Nor did the trial judge rule that it had lost its jurisdiction to rule on the MUNIZ motion. 27 days thereafter, On October 24, 1996 Mrs. Muniz filed her appeal.

The Municipality brought a motion to dismiss the MUNIZ appeal before the California First District Court Of Appeal arguing that the trial court had no jurisdiction to rule on the MUNIZ motion in view of the judgment that had previously been entered; that the trial court's September 27, 1996 ruling on the MUNIZ motion was moot; arguing therefore that the

filing of the appeal by Mrs. Muniz was untimely late. MUNIZ argued in opposition to the motion to dismiss that the trial court under California authorities could disregard the judgment as improvident and inadvertent and rule on MUNIZ' motion in the proper exercise of the trial court's jurisdiction; and in effect that is what the trial court did, de facto. MUNIZ in addition argued at every stage of the appeal that they were denied due process of law when the Municipality solicited the trial judge's signature on the judgment form without giving MUNIZ any notice of such course of conduct.

The California First District Of Appeal dismissed Mrs. Muniz' appeal for "Good cause appearing", without giving any further explanation. Mrs. Muniz' petition for a rehearing was denied. Her Petition before the California Supreme Court was also denied. No explanation or opinion was given by the Appellate or the California Supreme Court. The California courts of higher review did not specify any grounds for their decisions, other than "Good cause appearing", nor did they explicitly decide whether MUNIZ was, or was not, denied due process

of law despite the question being raised on appeal.

V RAISING THE FEDERAL QUESTION

In the Municipality's motion to dismiss the appeal it was argued that a trial court has power to consider a motion for reconsideration only before a judgment is entered. The Municipality argued that the trial court's denial of Mrs. Muniz' motion for reconsideration was moot since it lacked the power to change the judgment. According to its theory Mrs. Muniz could not have appealed the allowable 27 days after the denial of her motion to reconsider, but rather from the date of notice of entry judgment, 98 days earlier, long past the statutory deadline.

Mrs. Muniz argued in her Response to motion to dismiss appeal that she was prevented from making the trial judge aware that her motion for reconsideration was pending before the court at the time the judge's signature on the judgment

because she was not given notice that the Municipality was soliciting a judgment.

Motion To Dismiss Appeal at pg.60. Petitioner raised the Federal Question in the following Due Process argument in (Appendix, Response, pg.60), of her Response to Motion To Dismiss Appeal:

> "It is customary practice for counsel to submit all judgment and order forms prepared by counsel to their opposition for review and approval as to form substance, and to give fair notice of impending actions. Respondent's counsel chose not to do so. Due process and fundamental fairness dictate that respondent's counsel give appellants fair notice, particularly in view of the then pending motion for reconsideration. Respondent chose not to be fair. Respondent trifled with the court and manipulated an advantage."

Petitioner further argued in her response that the court "unwittingly signed the judgment, thereby subjecting itself to the later objection that it divested itself of jurisdiction." (Appendix, Response, pg. 63) Petitioner argued that she was "deliberately kept in ignorance" of the judgment until after it was signed and filed; and that she was "denied a fair adversarial hearing on October 1, 1996 because of respondent's jurisdictional objection of July 30, 1996." (Appendix, Response, pg.64).

The First District Court Of Appeal dismissed the appeal on January 9, 1997 for "Good cause appearing," without further explanation. Mrs. Muniz filed a petition for rehearing on January 24, 1997, which was denied on January 30, 1997 in a six word order that recited, to wit: "The petition for rehearing is denied." (Appendix, Orders, pg. 31 & 32).

In her petition for a rehearing Mrs. Muniz again complained of the deprivation of notice suffered at the hands of the Municipality. She argued she was the victim of

extrinsic fraud because she was not given notice of the action taken by the Municipality to get the trial judge to sign a judgment. (Appendix, Appellant's Petition For A Rehearing Of The Court's Dismissal Of Appellants' Appeal, pg. 68). "Indeed, respondent deliberately kept appellants in ignorance of this ex parte action until after the secret judgment was signed and filed." (Appendix, Petition For Rehearing, pg 69).

Muniz timely filed their Petition For Review in the California Supreme Court on February 18, 1997. In their petition MUNIZ raised the due process Federal Question in the "Issues Presented For Review" subsection, at page 72, paragraph I. C., as follows:

> "SUBSIDIARY ISSUE: WITH A MOTION FOR RECONSIDERATION OF AN ORDER GRANTING SUMMARY JUDGMENT PENDING BEFORE THE COURT CAN COUNSEL SUBMIT A JUDGMENT FORM

FOR JUDGE'S SIGNATURE WITHOUT GIVING NOTICE TO OPPOSING COUNSEL? IS SUCH ACTION MERE FORMALITY OR DOES IT VIOLATE DUE PROCESS?"

The due process issue was discussed in subsection III, D, of the Petition For Review. The subtitle of said subsection stated the question in boldface type, as follows: (Appendix, pg.72).

"Was The Submission Of The Judgment Form By Respondent To The Trial Judge Without Giving Notice To Plaintiff A Denial Of Due Process?"

Petitioner argued the "ex parte presentation of the judgment form to the trial judge" in view of the then pending motion for reconsideration raised ethical questions and was "imbued with notions of procedural due process." (Appendix, Petition For Review, pg. 73, section D).

Petitioner the argued that the ex parte submission of the judgment to the trial judge was a violation of Rule 5-300(B) of California Rules Of Professional Conduct prohibiting a member of the State Bar from communicating with a judge on the merits of an action pending before the court unless in open court, with the consent of all other counsel, or in writing with a copy of the communication furnished to all other counsel.

Rule 5-300(B)(5) of the Rules Of Professional Conduct allows an exception only as to ex parte matter. In the circumstances was the ex parte judgment an "ex parte matter?" Or as stated by petitioner in her petition, page 10 - 11, as follows: (Appendix, Petition For Review, pg. 74).

> "Or, in the circumstances of this case did the submission of judgment go right to the heart of the merits of this contested action? If so, were fundamental notions of due process and fair play violated?"

Petitioner asked the California Supreme Court to settle this important question of law.

The Municipality did not respond to the above lack of notice and due process challenges in its "Answer To Petition For Review". Instead, the Municipality reiterated the arguments made in its motion to dismiss appeal which hinged on the judgment and the notice of its entry. Nevertheless, Mrs. Muniz again raised the due process issue in her "Reply To Answer To Petition For Review" (Hereinafter referred to as "reply"). Petitioner argued the following at Part IV, of her reply immediately under the subtitle, to wit: "COUNTY FAILS TO RESPOND TO ETHICAL QUESTIONS AND DUE PROCESS ISSUES": (Appendix, Reply, pg.76).

> "Perhaps most disturbing in COUNTY'S unexplained silence to the due process and ethical questions raised by MUNIZ over COUNTY'S ex parte communication of a judgment form to the trial judge for his signature

while a timely motion for reconsideration was pending."

Despite having raised and repeated the procedural due process question before the California Supreme Court, the Court on April 23, 1997 denied MUNIZ' Petition For Review, without opinion.

VI ARGUMENT

1. Notice, The First Principle Of Justice.

At stake in this petition for review is "that principle of natural justice which requires a person to have notice ...". Pennoyer v. Neff (1877) 95 U.S. 714,730, 24 L.E. 565, 571. In Pennoyer, this Court was concerned with the service by publication of summons on a non-resident who was never given actual notice that a suit had been brought against him. Unlike Mr. Pennoyer, plaintiff MUNIZ initiated her action and brought herself within the jurisdiction of the trail court.

However, this distinction does not resolve the issue of due process notice. With a motion for reconsideration of the trial court's order granting summary judgment properly pending before the court, before judgment had ever been issued, MUNIZ should have been able to rest on the assurances of the principles of fundamental fairness and due process that her motion for reconsideration would be duly considered, whether granted or denied. If it was not duly considered, because of the intrusion of an unnoticed judgment, then at least elementary notions of due and fair process would require that petitioner should have been given notice and opportunity to object to the bid for judgment before it was ever entered on grounds that her duly pending motion for reconsideration had not yet been considered. But the bid was surreptitious. It was covert. The judgment was obtained by stealth. To bind a party personally, "when he was never personally summoned *or had notice of the proceeding,* would be contrary to the first principles of justice." [Emphasis added]. Pennoyer, 95 U.S. at 732, 24 L.E. at 572:

> "if to hold a defendant bound by such a judgment is contrary to the first principles of justice, ---it is difficult to see how the judgment can legitimately have any force within the State." Id.

This court said in Pennoyer that, "Since the adoption of the Fourteenth Amendment to the Federal Constitution" the validity of judgments obtained without

notice may be directly challenged on the grounds that their enforcement "do not constitute due process of law." (Pennoyer, 95 U.S. at 733, 24 L.E. at 572).

2. The Judgment Was In Fact Disregarded By The Trial Court. In Effect The Judgment Was Treated As A Nullity.

The trial judge in effect disregarded and ignored the judgment in his ruling on MUNIZ' motion for reconsideration, rendered

78 days after entry of judgment on July 15, 1996. The trial judge's September 27, 1996 ruling made no reference to the judgment. The judge ruled only that, "The Plaintiff's Motion

For Reconsideration is denied. The Court's prior order granting the Motion for Summary Judgment is confirmed." (Appendix, Order After Hearing pg.46).

The trial judge in effect disregarded the judgment in his ruling. Had the judge determined that the judgment was valid then he would have divested himself of jurisdiction to rule on MUNIZ' motion under

California authorities. But he did not. In the exercise of his jurisdiction to rule on the motion the judge treated the judgment as a nullity consistent with California authorities. Under the authority of Gill v. Epstein (1965) 62 C.2d 611, a trial court may, independent of statute, correct mistakes, and annul or vacate orders and judgments improvident or

inadvertently made. (Id. 614-615). Where the court is deceived or is laboring under mistake or misapprehension as to the state of the record or as to the existence of extrinsic facts upon which its action is predicted, the court has the inherent power to vacate a judgment which would not otherwise have been entered. (Key System Transit Lines v. Superior Court (1950) 36 C 2d 184, 187-188).

It follows that the Municipality's argument before the appellate courts that MUNIZ' appeal was filed untimely late dating from the date of the surreptitious judgment misstates the trial record and sets the stage for the denial of due process of law on appeal.

3. The Municipality's Arguments On Appeal In The State Courts Mistakenly Rely On A Surreptitious Judgment Obtained In Violation Of Petitioners' Right Of Due Process Notice.

The Municipality argued in its motion to dismiss the appeal that Mrs. Muniz appealed from the trial court's judgment. This misrepresents the nature of the appeal. Mrs. Muniz explicitly states in her Notice Of Appeal that the appeal is taken from the trial court's order denying their motion and confirming its prior order granting the Municipality's motion for summary judgment. (Appendix, Plaintiffs' Notice Of Appeal, at pg.51, subsection k).

When the trial court issued its order on September 27, 1996 denying the MUNIZ motion, the appeal was filed 27 days later on October 24, 1996, within the 30 day extension of time to appeal granted by California Rule Of Court 3(b). California courts have treated a motion for reconsideration the same as a motion for a new trial or motion to vacate under Rule 3(b) of the California Rules Of Court for purposes of extending the time to appeal. (Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1009-1010).

If the State appellate courts adopted the Municipality's judgment argument as "Good cause appearing" for dismissal, then Mrs. Muniz suffered the denial of her right to due process under the U.S. Constitution. All of the Municipality's arguments made in support of its motion to dismiss the appeal are variations of its judgment argument and therefore, the due process issue is all pervasive.

Although this Court in Pennoyer, formulated its language in a case where there was a denial of jurisdictional due process service of summons, this Court's annunciation of the fundamental right to personal notice in "proceedings in a court of justice to determine the personal rights and obligations of parties", speak to the heart of the deprivation of right that was practiced here.

In addressing the meaning of the terms "due process of law", this Court said in Pennoyer v. Neff, (1877) 95 U.S. 714, 733, 24 L.E. 565, 572:

> "Whatever difficulty may be experienced in giving to those terms definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings."

The first principles of justice ought to exclude as forbidden the practice of unnoticed solicitations of judgments in ongoing litigation as violation of the right to due process of law under the U.S. Constitution.

The Municipality's counsel had notice that Mrs. Muniz had a motion filed and pending when counsel solicited the trial judge's signature on a judgment form. So what were they thinking when they elicited their judgment knowing that substantive matters were at issue before the court? Counsel had the name, address and telephone number of Mrs. Muniz' attorney of record. What small effort would there have been

to notify petitioner's attorney?

In a case decided by the Supreme Court of Oklahoma, Hagar v. Goodyear Tire & Rubber Co. (1993) 853 P. 2d 768, the court held that "due process required notice before taking default when a responsive pleading appeared in the record." (Id. at 769). The court held that

> "Lack of notice constitutes a jurisdictional infirmity...When the name and address of a party or attorney is readily available, notice is a prerequisite to valid proceedings." (Id. at 769-770).

And in further defining notice in terms of due process the court stated, "Notice is a jurisdictional requirement and a fundamental element of due process." (Id. at 769).

"Due process requires adequate notice, a realistic opportunity to appear and the right to participate in a meaningful manner." (Id).

VII CONCLUSION

By what principle of jurisprudence is a litigant allowed to backdoor a judgment and hornswaggle a judge to sign it, then appear in court and with feigned innocence argue that the court may not consider a duly pending noticed motion antedating the judgment? The trial court nevertheless rules on the motion in disregard of the judgment only to have the case dismissed on appeal based on arguments predicated upon the unnoticed judgment. Surely, Constitutional principles of due process notice cannot respect such unconscionable practice.

The petitioners respectfully request this Supreme Court and guardian of fairness to review and then remand the case to a trial of the facts in dispute in the California trial courts.

APPENDIX A

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT

DIVISION FOUR

JUANA MUNIZ, etc. et al.
v.
SOLANO COUNTY

FILED
Court of Appeal First App. Dist.
JAN - 9 1997
RON D. BARROW, CLERK
BY_____
DEPUTY

A076148
Solano County
Sup. Ct. No. L 004442

BY THE COURT:

Good cause appearing, respondent's motion to dismiss is granted and this appeal is hereby dismissed.

(Anderson, P.J., Reardon, J. and Hanlon, J.

participated in the decision.)

JAN - 9 1997 ANDERSON P.J.

Date_____ _____

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION 4

JUANA MUNIZ, et al.,
Plaintiffs and Appellants,
v.
COUNTY OF SOLANO,
Defendant and Respondent.

FILED
Court of Appeal First App. Dist.
JAN 30 1997
RON. D. BARROW, CLERK
BY_____
DEPUTY

A076148
Solano County Super. Ct. No. 004442

BY THE COURT:

The petition for rehearing is denied.

DATE: Jan 30 1997

REARDON, ACTING P.J.
_____P.J.

First Appellate District, Division Four, No. A076148
S059181

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT

JUANA MUNIZ Et Al., Appellants — FILED

APR 10 1997

v. — ROBERT WANDRUFF CLERK

SOLANO COUNTY, Respondent — DEPUTY

The time for granting or denying review in the above cause is hereby extended to and including May 19,1997, or the date upon which review is either granted for denied.

Chief Justice

First Appellate District, Division Four, No. A076148
S059181

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED

JUANA MUNIZ Et. Al., Appellants

APR 23 1997

Robert Wandruff Clerk

v.

DEPUTY

SOLANO COUNTY, Respondent

Appellants' petition for review DENIED.

GEORGE

Chief Justice

First Appellate District No. A076148
DIVISION FOUR
Solano Superior Court No. L004442

COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

JUANA MUNIZ, JUANA MUNIZ for and on behalf of EDNA MUNIZ and EDNA MUNIZ,

Plaintiffs and Appellants,

v.

SOLANO COUNTY,

Respondent.

_____/

DECLARATION OF MICHAEL F. TRUSKOL RELATING TERMS OF TRIAL COURT'S JULY 29, 1996 TENTATIVE RULING

I, Michael F. Truskol, declare as follows:

1. I am the attorney for JUANA MUNIZ, JUANA MUNIZ for an on behalf of EDNA MUNIZ, and EDNA MUNIZ, plaintiffs/appellants in this action.

2. I am an attorney at law duly licensed to practice before all Courts of the State of California.

3. I have personal knowledge as to the following except where stated to be based on information and belief.

4. On July 1, 1996 I filed in the lower court a motion for reconsideration based upon new or different facts and circumstances. I set the motion for hearing on July 30, 1996. On July 29, 1996 I personally phoned the Solano County Superior Court's tentative ruling recording line. I heard and contemporaneously wrote notes of the court's tentative ruling. My notes are attached as exhibit "4". My notes and my best recollection indicate that the court's tentative ruling was substantially as follows:

Tentative Ruling: Plaintiffs' motion for reconsideration is granted. The court will

hear the matter on Oct. 1, 1996 at 8:30 A.M. The parties are given sufficient time to take whatever steps they wish to prepare for the hearing. The parties are to properly authenticate evidence that is not already properly authenticated. The only briefing necessary is as to the newly discovered evidence.

5. Late in the afternoon of July 29, 1996 I was informed by telephone from respondent's attorneys that they had informed the Court of their demand for a hearing on the Court's tentative ruling for the following day, July 39, 1996. The parties, through their respective counsel, appeared at the hearing. (A reporters transcript of the proceedings of July 30, 1996 hearing was filed and made part of the record of this District Court Of Appeal on December 17, 1996 by Solano County Superior Court Clerk).

6. The Reporter's Transcript of the July 30, 1996 Proceedings, reflect that respondent made a jurisdictional

objection in view of the entry of judgment. The court requested the filing of jurisdictional briefs and took the entire matter under submission. The prospective hearing date of October 1, 1996 that was ordered in previous day's tentative ruling was aborted.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California.

Executed this 31st day of December 1996 at Sacramento, California.

_____

MICHAEL F. TRUSKOL

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ENDORSED FILED
96 JUL 15 A.M. 7:42
CHARLES D. RAMEY
L SOLUM

ATTORNEYS FOR: Defendant COUNTY OF SOLANO

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SOLANO

JUANA MUNIZ, et al.,

Plaintiffs,

v.

COUNTY OF SOLANO, et al.,

Defendants

_____/

No.L004442

JUDGMENT

On June 25, 1996, the Court granted the motion of Defendant COUNTY OF SOLANO made pursuant to Code of

Civil Procedure Section 437(c) for an order that summary judgment be entered for Defendant COUNTY OF SOLANO and against Plaintiffs JUANA MUNIZ, JUANA MUNIZ for and behalf of EDNA MUNIZ, and EDNA MUNIZ. In accordance with that order,

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiffs JUANA MUNIZ, JUANA MUNIZ for and behalf of EDNA MUNIZ, and EDNA MUNIZ take nothing by their Complaint from Defendant COUNTY OF SOLANO and that Defendant COUNTY OF SOLANO have and recover its costs from Plaintiffs JUANA MUNIZ, JUANA MUNIZ for and on behalf of EDNA MUNIZ, and EDNA MUNIZ in the sum of $_____, according to proof.

Dated: 7-10-96 JAMES F. MOELK

JUDGE OF THE SUPERIOR COURT

Law Offices Of
Porter, Scott, Weiberg & Delehant
A Professional Corporation
350 University Avenue, Suite 200
Post Office Box 255428
Sacramento, California 95865
(916) 929-1481

Ned P. Telford - Bar #79208

ATTORNEYS FOR: Defendant COUNTY OF SOLANO

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SOLANO

JUANA MUNIZ, et al., No.L004442

Plaintiffs, NOTICE OF ENTRY JUDGMENT

v.

COUNTY OF SOLANO, et al.,

Defendants.

_____/

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on July 15, 1996, the Clerk of the Court entered a Judgment, a true and copy of which is attached hereto, marked Exhibit A and incorporated herein by reference.

DATED: July 18, 1996

PORTER, SCOTT, WEIBERG
& DELEHANT
A Professional Corporation

By NED P. TELFORD
Attorneys for Defendant
COUNTY OF SOLANO

DECLARATION OF SERVICE BY MAIL

I am a citizen of the United States and resident of Sacramento County, California. I am over the age of eighteen years and not a party to the within above-entitled action. My business address is 350 University Avenue, Suite 200, Sacramento, California. I am readily familiar with Porter, Scott, Weiberg & Delehant's practice in its office for collection and processing of correspondence for mailing with the United States Postal Service. Pursuant to that practice, envelopes placed for collection at designated locations during designated hours are deposited with the United States Postal Service with first class postage thereon fully prepaid that same day in the ordinary course of business

On this date I served the attached NOTICE OF ENTRY JUDGMENT by placing a true copy thereof enclosed in a sealed envelope addressed to each of the persons named below and addressed as follows:

Michael F. Truskol
Attorney at Law
3620 Chiles Road
Davis, Ca 95616

and then by placing said envelope for collection at the designated location at Porter, Scott, Weiberg & Delehant's offices during designated hours, for mailing on this date, following ordinary business practice.

I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Sacramento, California on July 18, 1996

Christine Guina

FILED
SEP 27 1996
CHARLES D. RAMEY
By Clerk of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SOLANO
DEPARTMENT 6
* * * *

JUANA MUNIZ, et al., No. L4442

Plaintiffs, ORDER AFTER HEARING

vs.

COUNTY OF SOLANO, et al.,

Defendant's
_____/

The Motion of plaintiff, Juana Muniz, for Reconsideration of Summary Judgment came on regularly for herein before the Honorable James F. Moelk, Judge presiding. Attorney Michael F. Truskol appeared on behalf of the Plaintiffs. Attorney John C. Padrick, appeared on behalf

of the defendant, County Of Solano. Oral argument was presented and, thereafter, the court took the matter under submission. The court now finds:

The Plaintiff's Motion for Reconsideration is denied. The Court's prior order granting the Motion for Summary Judgment is confirmed.

Dated: September 27, 1996.

JAMES F. MOELK

JUDGE OF THE SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SOLANO DEPARTMENT 6

CASE NUMBER: L4442

CERTIFICATE OF MAILING

I, Kaye J. Isnor, certify under penalty of perjury that I am judicial assistant/deputy clerk of the above-entitled court and not a party to the within action; that I am familiar with the County of Solano's procedure for collection and processing of correspondence for mailing with the United States Postal Service. This document will be deposited with the United States Postal Service on the same day as the execution of this document in the ordinary course of business. This document was sealed and placed for collection and mailing on the same day as the execution of the document at the address given for deposit in the United States Postal Service and following ordinary business practices. Said envelopes were addressed to the attorneys for the parties, or the parties, as shown below:

Document Mailed: ORDER AFTER HEARING

Michael F. Truskol
Attorney at Law
3620 Chiles Road
Davis, CA 95616

Ned P. Telford, Esq.
PORTER, SCOTT, WEIBERG & DELEHANT
P.O. Box 255428
Sacramento, CA 95685

Dated: September 27, 1996

KAYE J. ISNOR-DECLARANT

APPENDIX B

MICHAEL F. TRUSKOL
ATTORNEY AT LAW
STATE BAR NO. 51723
3620 Chiles Road
Davis, CA 95616
(916) 758-0302

ENDORSED FILED
Clerk of the Superior Court
96 OCT 24 PM 2:49
CHARLES RAMEY
By Lydia Mendoza

ATTORNEY FOR PLAINTIFFS

CALIFORNIA SUPERIOR COURT
SOLANO COUNTY

JUANA MUNIZ,
JUANA MUNIZ
FOR AND
ON BEHALF OF
EDNA MUNIZ,
AND EDNA MUNIZ

Plaintiffs,

Vs.

COUNTY OF SOLANO

Defendant.
_____/

No. L004442
NOTICE OF APPEAL
APPELLANT: PLAINTIFF

Date:
Time:
Dept:

(Relevant Extracts Of Original Brief)

k. The trial court denied plaintiffs a fair hearing and their right to trial.

On the above grounds and on every other relevant ground plaintiffs appeal from the decision of the trial court granting defendant COUNTY OF SOLANO'S Motion For summary Judgment and the trial court's subsequent decision of September 27, 1996 denying plaintiffs' Motion For Reconsideration and reaffirming the courts order granting defendant's Motion For summary Judgment.

The presiding judge of the COUNTY OF SOLANO abused his discretion by misapplying the rules of construction that apply to summary judgment motions in ruling favorably for the defendant COUNTY OF SOLANO and dismissing plaintiffs MUNIZ' action.

The presiding judge of the COUNTY OF SOLANO severely impaired the right of innocent children by imputing to them unproven negligence of others if denying survivor's actions for their wrongful deaths.

MICHAEL F. TRUSKOL
ATTORNEY AT LAW
STATE BAR NO. 51723
3620 Chiles Road
Davis, CA 95616
(916) 758-0302

ATTORNEY FOR PLAINTIFFS

ENDORSED FILED
96 AUG-8
CHARLES D. RAMEY
By L. SOLUM

CALIFORNIA SUPERIOR COURT
SOLANO COUNTY

JUANA MUNIZ, JUANA MUNIZ FOR AND ON BEHALF OF EDNA MUNIZ, AND EDNA MUNIZ

Plaintiffs,

vs.

COUNTY OF SOLANO
Defendant.
_____/

NO. L004442

DECLARATION OF

Date:
Time:
Dept: 6

DECLARATION OF MICHAEL F. TRUSKOL REGARDING SUBMISSION OF JUDGMENT FORM TO THE COURT

I MICHAEL F. TRUSKOL, say:

1. I am the attorney of record for the plaintiffs in this action. I am an active member of the State Bar of California.

2. On June 25, 1996, I was informed by phone from Kay Isnor, secretary to the Honorable Judge Moelk that the Court had issued an order granting the defendant COUNTY OF SOLANO'S Motion For Summary Judgment, and that the scheduled trial had been removed from the Court's calendar.

3. On July 1, 1996, the undersigned filed a Motion For Reconsideration based upon newly discovered evidence.

4. On July 19, 1996, the undersigned attorney received in the mail the notice of entry judgment on the defendant's motion for summary judgment. The notice had been served by mail on July 18, 1996 by defendant's attorneys. Prior to this time the plaintiffs had no knowledge that any judgment had been submitted by defendant's attorneys to the Court. It appears from the face of the judgment that it was prepared by defendant's attorneys and submitted to the court.

5. Defendant's attorneys failed to notice plaintiffs' attorney of this action and did not provide to the plaintiffs' attorney a copy of the submittal to the Court.

6. Plaintiffs' attorney was not aware from any other source that any judgment had been presented to the Court at the time when plaintiffs' motion for reconsideration was pending. 7. Had plaintiffs' attorney been notified that a judgment had been submitted tot he Court, plaintiffs' attorney would have had the opportunity to, and would have reminded court and counsel that a motion for reconsideration had been filed and was pending.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 7, 1996 at Davis, California.

MICHAEL F. TRUSKOL
Attorney for Plaintiffs

MICHAEL F. TRUSKOL
ATTORNEY AT LAW
STATE BAR NO. 51723
3620 Chiles Road
Davis, CA 95616
(916) 758-0302

ATTORNEY FOR PLAINTIFFS

ENDORSED FILED
96 JUL-1 P.M. 2:05
CHARLES D. RAMEY
By L. Solum

CALIFORNIA SUPERIOR COURT
SOLANO COUNTY

JUANA MUNIZ, JUANA MUNIZ FOR AND ON BEHALF OF EDNA MUNIZ, AND EDNA MUNIZ

No. L004442

Plaintiffs,

vs.

COUNTY OF SOLANO

Defendant.

_____/

Date: July 30, 1996
Time: 8:30 A.M.
Dept: 6

NOTICE OF MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

To defendant County of Solano and its attorneys of record:

PLEASE TAKE NOTICE: that on July 30, 1996 at 8:30 A.M. in the above entitled Court, Department 6, before the Honorable James F. Moelk, Judge of the Superior Court, plaintiffs will move for reconsideration of the Courts Order of June 25, 1996 granting defendant's Motion For Summary Judgment.

This action will be made on the grounds set forth in the accompanying motion and exhibits, points and authorities, supporting declarations of Jefferey L. Zehnder and plaintiffs' attorney Michael F. Truskol, plaintiffs motion in limine to exclude blood alcohol report, and such further and other papers, evidence and testimony

MICHAEL F. TRUSKOL
ATTORNEY AT LAW
STATE BAR NO. 51723
3620 Chiles Road
Davis, CA 95616
(916) 758-0302

ENDORSED FILED
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SUPERIOR COURT
CLERK OF THE SUPERIOR COURT
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CHARLES D. RAMEY
By L. SOLUM

ATTORNEY FOR PLAINTIFFS

CALIFORNIA SUPERIOR COURT
SOLANO COUNTY

JUANA MUNIZ, JUANA MUNIZ FOR AND ON BEHALF OF EDNA MUNIZ, AND EDNA MUNIZ

No. L004442

Plaintiffs,

vs.

COUNTY OF SOLANO

Defendant.

Date: 7-30-96
Time: 8:30 A.M.
Dept:6

_____/

PLAINTIFFS MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANTS MOTION FOR

SUMMARY JUDGMENT
C.C.P. Section 1008

COMES NOW the plaintiffs who, pursuant to California Code of Civil Procedure section 1008 providing that when an application for an order has been made to a Judge, any party affected by the order may, within ten (10) days after knowledge of the order and based upon an alleged different state of facts, make application to the same Judge who made the order, to reconsider the matter and modify, amend or revoke the prior order, apply for reconsideration.

On March 4, 1996 the defendant in this action filed its Notice Of Motion For Summary Judgment. The Court issued its tentative ruling on April 17, 1996. At the request of the plaintiffs the matter was heard for argument on April 18, 1996.

First Appellate District No. A076148
DIVISION FOUR
Solano Superior Court No. L004442

COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

JUANA MUNIZ, JUANA MUNIZ
for and on behalf of EDNA MUNIZ, and
EDNA MUNIZ,

Plaintiffs and Appellants,

v.

SOLANO COUNTY,

Respondent.

_____/

PLAINTIFFS APPELLANTS' RESPONSE TO DEFENDANT RESPONDENT'S MOTION TO DISMISS PLAINTIFFS' APPEAL

(Relevant Extracts Of Original Brief)

DISCUSSION

The lower court signed the judgment form on July 10, 1996, nine days after appellants filed their section 1008 motion and 15 days before appellants' motion was scheduled to be heard. It is apparent that the trial judge had not yet been made aware that appellants' motion was scheduled to be heard on July 30, 1996, 15 days from the date of the judgment signing. Counsel for appellants was prevented from making the court aware of appellants' section 1008 motion before the signing of the judgment because counsel was not copied or given notice that any judgment was being submitted for court signature. (See Declaration Of MICHAEL F. TRUSKOL Regarding Submission Of Judgment Form To The Court, attached as Exhibit "2").

It is customary practice for counsel to submit all judgment and order forms prepared by counsel to their opposition for review and approval as to form and substance, and to give fair notice of impending actions. Respondent's counsel chose not to do so. Due process and fundamental

fairness dictate that respondent's counsel give appellants fair notice, particularly in view of the then pending motion for reconsideration. Respondent chose not to be fair. Respondent trifled with the court and manipulated an advantage. Moreover, respondent put the lower court in an awkward position. On July 29, 1996 the court granted an October 1, 1996 hearing on appellants' motion, but after it signed a judgment. The court was interested in appellants' evidentiary challenges to respondent's evidence and allowed sufficient time (October 1, 1996) for a full and fair hearing. (Reporter's Transcript On Appeal Of Proceedings on July 30, 1996, pg 4: 7-12). But the hearing was aborted on July 30, 1996, when faced with respondent's jurisdictional objection.

Would the lower court have intentionally deprived itself of its power and jurisdiction to hear appellants' motion for reconsideration when it was the court's obvious intention to hear the motion? Was the lower court's act of signing the judgment the deliberate result of judicial reasoning? It is most apparent that the act of signing and entering judgment was improvident and inadvertent.

The respondent has trifled with he systems, that is, with the courts. This trifling should not be rewarded. Where the court is deceived or is laboring under mistake or misapprehension **as the state of the record** or as to the existence of extrinsic facts upon which its action is predicted, the court has the inherent power to vacate a judgment which would not otherwise have been rendered. Key System Transit Lines v. Superior Court (1950) 36 Cal. 2d 184, 187-188.

In essence, the court considered and denied appellants' motion for reconsideration on September 27, 2996. In so doing, the court implicitly exercised its inherent power to vacate its judgment taken improvident and inadvertently on July 15, 1996 (date of entry), at least until its September 27, 1996 order denying appellants' motion and confirming its prior order granting summary judgment. *In the order, Judge Moelk makes no reference to the judgment.* (Respondent's Exhibit "E").

There was no other logical conclusion. The courts do not engage in idle acts. Judge Moelk's order of September 27, 1996 was not an idle exercise, or a "moot" act as

respondent argues. Appellants' appeal taken 27 days later was within the time prescribed by Rule 3, California Rules of Court.

IV

THE JUDGMENT MAY BE DISREGARDED UNDER THE EQUITABLE DOCTRINE OF EXTRINSIC FRAUD

Appellants were not given notice by respondent that it was causing the court to sign a judgment while a duly filed motion for reconsideration was pending. (See Declaration Of MICHAEL F. TRUSKOL Regarding Submission Of Judgment Form To The Court, attached to this response as Appellants' Exhibit "2"). The court unwittingly signed the judgment, thereby subjecting itself to the claim that it divested itself of jurisdiction. Can the court nevertheless disregard the judgment and rule on the motion? The court indeed can under its equitable powers as well.

The trial court sitting in equity, can set aside a

judgment obtained by extrinsic fraud, mistake or accident. Extrinsic fraud occurs when a party is deprived of the opportunity to present his case to the court, where he was kept ignorant or, fraudulently prevented from fully participating in the proceedings. It may be the result of failure to receive notice of action taken by the other party. The essence of extrinsic fraud is one party's preventing the other from having his day in court. City and County of San Francisco v. Cartagena (1995) 35 Cal. App. 4th 1061, 1066-1067. "Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been 'deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting the claim or defense.'" (Id. at 1067).

Here, appellants were deliberately kept in ignorance of the action taken to get the judgment signed until after it was signed and filed. Appellants were then denied a fair adversarial hearing October 1, 1996 because of respondent's jurisdictional objection July 30, 1996. The court nevertheless disregarded the judgment an don September 27, 1996 ruled

on appellants' motion after taking the matter under submission. (Reporter's Transcript of July 30, 1996 Proceedings, pg.5:19-23).

The court in effect set aside its judgment, whether for fraud, mistake, or accident, until its ruling on September 27, 1996 when it formally denied appellants' motion for reconsideration. Since appellants' Notice Of Appeal was filed within 30 days of September 27, 1996, that is, on October 24, 1996, appellants' appeal was timely under Rule 3 of California Rules Of Court.

IN THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT

No. A076148
DIVISION FOUR

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SAN FRANCISCO

FILED
Court of Appeal- First App. Dist.
JAN 24 1997
By RON D. BARROW, CLERK
DEPUTY

JUANA MUNIZ. JUANA MUNIZ
for and on behalf of EDNA MUNIZ,
and EDNA MUNIZ

Plaintiffs and Appellants,

V.

SOLANO COUNTY,

Respondent.

_____/

SOLANO COUNTY SUPERIOR COURT CASE NO. L004442 HONORABLE MOELK, JUDGE

_____

APPELLANTS' PETITION FOR A REHEARING OF THE COURT'S DISMISSAL OF APPELLANTS' APPEAL

MICHAEL F. TRUSKOL, BAR NO.51723
ATTORNEY AT LAW
3620 CHILES ROAD
DAVIS, CA 95616
(916) 758-0302

Attorney For Appellants
JUANA MUNIZ, EDNA MUNIZ

2. THE JUDGMENT MAY BE DISREGARDED UNDER THE EQUITABLE DOCTRINE OF EXTRINSIC FRAUD

Alternatively, trial court sitting in equity may set aside a judgment obtained by extrinsic fraud, mistake or accident. Extrinsic fraud occurs when a party is deprived of the opportunity to present his case to the court, where he was kept ignorant or, fraudulently prevented from fully participating in the proceedings. It may be the result of failure to receive notice of action taken by the other party. The essence of extrinsic fraud is one party's preventing the other from having his day in court. (City and County of San Francisco v. Cartagena (1995) 35 Cal. App. 4th 1061, 1066-1067). "Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been 'deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting the claim or defense.'" (Id. at 1067).

Here, it is undisputed that respondent failed to provide

any notice to adverse parties that it submitted a judgment to the trial judge, notwithstanding that appellants' duly filed motion for reconsideration was pending. (See Declaration of MICHAEL F. TRUSKOL Regarding Submission Of Judgment Form To The Court, attached to Plaintiffs' Appellants' Response To Defendant Respondent's Motion to Dismiss Appeal, as Exhibit "2"). Indeed, respondent deliberately kept appellants in ignorance of this ex parte action until after secret judgment was signed and filed.

Appellants advised the court of their lack of notice in their briefing arguments. Cognizant of this extrinsic fraud, the court considered and denied appellants' motion for reconsideration on September 27, 1996. Clearly, the court could not have ruled upon appellants' motion unless it had implicitly set aside its judgment, whether fraud, mistake, or accident, until its ruling on September 27, 1996 when it formally denied appellants' motion for reconsideration. Since appellants' Notice Of Appeal was filed within 30 days of September 27, 1996, that is, on October 24,1996, appellants'

appeal was timely under Rule 3 of California Rules of Court .

Appellants properly stand before this Court of Appeal.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
FEB 18 1997
Robert Wandruff Clerk

_____
DEPUTY

JUANA MUNIZ, JUANA MUNIZ for and on behalf of EDNA MUNIZ and EDNA MUNIZ,

Plaintiffs and Appellants,

Vs.

SOLANO COUNTY,

Respondent.

_____/

FIRST APPELLATE DISTRICT CASE NO. A076148, DIVISION FOUR SOLANO COUNTY SUPERIOR COURT CASE NO. L004442

(Relevant Extracts of Original Brief)

I. ISSUES PRESENTED FOR REVIEW

C. SUBSIDAIRY ISSUE: WITH A MOTION FOR RECONSIDERATION OF AN ORDER GRANTING SUMMARY JUDGMENT PENDING BEFORE THE COURT CAN COUNSEL SUBMIT A JUDGMENT FORM FOR JUDGE'S SIGNATURE WITHOUT GIVING NOTICE TO OPPOSING COUNSEL? IS SUCH ACTION A MERE FORMALITY OR DOES IT VIOLATE DUE PROCESS?

PETITION FOR REVIEW
BY PLAINTIFFS APPELLANTS

D. SUBSIDIARY ISSUE: Was The Submission Of The Judgment Form By Respondent To The Trial Judge Without Giving Notice to Plaintiffs A Denial Of Due Process?

An underlying subsidiary issue is raised by respondent's ex parte presentation of the judgment form to the trial judge in view that a motion for reconsideration had

previously been scheduled and was pending before the court. The issue raises ethical questions and is imbued with notions of procedural due process.

Rule 5-300 (B) of California Rules Of Professional Conduct provides that a member of the state bar shall not directly or indirectly communicate with a judge upon the merits of a contested matter pending before the judge, except: (1) In open court; or (2) With the consent of all other counsel; or (3) In the presence of all other counsel; or (4) In writing with a copy thereof furnished to such other counsel; or (5) In ex parte matters.

Counsel for respondent failed to comply with conditions (1) through (4) of Rule 5-300(B) when they communicated the judgment form to the trial judge without giving notice of the communication to plaintiffs appellant. The failure to give plaintiffs appellants notice effectively precluded them from advising the judge that their CCP 1008 motion for reconsideration was pending. (See Declaration of Michael F. Truskol Regarding Submission of Judgment Form To The Court, **Exhibit 2**, to Plaintiffs Appellants' Response to

Defendant Respondent's Motion To Dismiss Plaintiffs' Appeal). The signing and filing of the judgment opened up a jurisdictional can of worms. Can counsel for the respondent present themselves to this Supreme Court with wholly innocent faces by taking advantage of their failure to give notice? Is this fair play?

Can the respondent's counsel avoid their ethical duty to give notice to plaintiffs by escaping through the ex parte exception of Rule 5-300 (B) (5)?

The question for this Court to resolve is, was the submission of the judgment to the trial judge a mere de minimus formality? Or in the circumstances of this case did the submission of judgment go right to the heart of the merits of this contested action? If so, were fundamental notions of due process and fair play violated? Plaintiffs appellants petition this Court to settle this important question of law.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Supreme Court No. S059181

SUPREME COURT
FILED
MAR 17 1997
Robert Wandruff Clerk
DEPUTY

JUANA MUNIZ, JUANA MUNIZ
for and on behalf of
EDNA MUNIZ
and EDNA MUNIZ,

Plaintiffs and Appellants,

Vs.

SOLANO COUNTY,

Respondent.
_____/

FIRST APPELLATE DISTRICT CASE NO. A 076148, DIVISION FOUR SOLANO COUNTY SUPERIOR COURT CASE NO. L004442

REPLY TO ANSWER TO PETITION FOR REVIEW

(Relevant Extracts Of Original Brief)

VI

COUNTY FAILS TO RESPOND TO ETHICAL QUESTIONS AND DUE PROCESS ISSUES

Perhaps most disturbing is COUNTY'S unexplained silence to the due process and ethical questions raised by MUNIZ over COUNTY'S ex parte communication of a judgment form to the trial judge for his signature while a timely motion for reconsideration was pending. It is an important question of law. COUNTY'S ex parte communication of judgment to the court goes to the question of the providence of the judgment. That question in turn goes to the question of the trial court's power to disregard it. If the trial court had the power to disregard its judgment then it had jurisdiction to rule on MUNIZ' motion. If the trial court's September 27, 1996 order was properly within its jurisdiction, then MUNIZ' appeal taken 27 days later on October 24, 1996, was timely.

Paul C. Roshenthall
3050 K Street Ste. 400
W.A., D.C. 20007
(202) 342-8485
Attorney For Petitioner

(2)

No. 97-238

Supreme Court, U.S.
FILED
SEP 8 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

JUANA MUNIZ, *et al.*,

Petitioners,

vs.

COUNTY OF SOLANO,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of California

RESPONDENT'S BRIEF IN OPPOSITION

TERENCE J. CASSIDY
Counsel of Record
NED P. TELFORD
PORTER, SCOTT, WEIBERG & DELEHANT
Attorneys for Respondent
350 University Avenue
Suite 200
P.O. Box 255428
Sacramento, California 95865
(916) 929-1481

71965 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

12 pp

QUESTION PRESENTED

Should this Court exercise its discretionary jurisdictional powers to determine whether the courts of California erred in denying plaintiffs' various motions for reconsideration on the grounds that those denials involved violations of procedural due process under the Fifth and Fourteenth Amendments when those issues were not raised or considered by those courts?

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STATEMENT OF THE CASE

The underlying litigation which gives rise to this petition involved a personal injury claim against a public entity, County of Solano. County of Solano moved for summary judgment and, by order dated June 25, 1996, it was granted. A judgment was then prepared and submitted to the court, and was executed by the court on July 10, 1996. Notice of Entry of Judgment was served on petitioners on July 18, 1996.

On July 1, 1996, petitioners filed a Request for Reconsideration of the court's ruling on the motion for summary judgment. Petitioners also served Notice of Intent to Move for New Trial and to Vacate the Judgment. The trial court did eventually hear petitioners' motion for reconsideration and issued a ruling, denying the same.

Petitioners then filed a Notice of Appeal of the granting of the summary judgment on October 24, 1996. Defendant moved to dismiss as the appeal was not timely. Petitioners then responded to defendant's motion to dismiss. The appeal was subsequently dismissed as untimely. Petitioners petitioned to the Supreme Court, which denied review.

Petitioners have been provided with numerous opportunities to raise issues which are now argued in the Petition for Writ of Certiorari before this Court. In no prior brief or argument to any court of the State of California did petitioners raise an issue of federal due process. Quite obviously, since it was never raised, no court ever decided any question of federal law.

REASONS FOR DENYING THE WRIT

Petitioners' argument in support of their petition for writ of certiorari is that there is an important federal question which was decided by the state court. Petitioners assert that they were denied due process pursuant to the Fourth and Fifteenth Amendments due to the procedure followed by the courts of the State of California. In support of this claim, petitioners cite only to the case of *Pennoyer v. Neff*, 95 U.S. 714 (1877). The position of petitioners is that federal due process was violated due to the fact they were not given notice at the time judgment was entered.

I.

PETITIONERS HAVE FAILED TO SHOW ANY "COMPELLING REASON" WHICH WOULD JUSTIFY THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI.

> Review of a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.

Rule 10 of the U.S. Supreme Court Rules.

Rule 10 essentially outlines the circumstances which are compelling and would justify a grant of review by the Supreme Court.

The Supreme Court does not sit to satisfy its scholarly interests or to consider issues which, in the abstract, may present intellectually interesting problems. (*Rice v. Sioux City Memorial Parks Cemetery,* 349 U.S. 70, 74, 75 S. Ct. 614, 616 (1955)). The principal purpose for which the Supreme Court uses its

certiorari jurisdiction is to resolve conflicts among federal courts of appeal and state courts concerning the meaning of provisions of federal law. (*Braxton v. United States,* 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991)).

A. No State Court has Decided a Federal Question.

In deciding whether the court should exercise its discretion and grant review, the court considers whether a state court or U.S. Court of Appeals has **decided** an important question of federal law that has not been, but should be, settled by this Court or has **decided** an important federal question in a way that conflicts with relevant decisions of this Court. (Rule 10(c) of the U.S. Supreme Court Rules.)

Petitioners' argument in support of their petition is devoid of any reference to any court deciding a federal question. Quite clearly, no court in California ever decided a federal question. It is only now that petitioners raise the issue regarding a federal question. "When the highest court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in the court can affirmatively show to the contrary." (*Exxon Corp. v. Eagerton,* 462 U.S. 176, 181 (1982), n. 3.) No court having ever considered or decided a question of federal law, petitioners' request for review by the Supreme Court must be denied.

B. Petitioners Never Raised a Federal Question in Any Court Below and, Therefore, Their Petition for Writ of Certiorari Must be Denied.

If the question raised in the petition was not raised below, then it will not be considered at the Supreme Court level. (*Ellis v. Dixon,* 349 U.S. 458, 460 (1955)). When a court has failed to

pass upon a federal question, the court will assume that it was due to the fact that it was not presented to that court, unless petitioner can show to the contrary. (*See Exxon Corp., supra.*) In the case presented, petitioners made no contrary showing. In fact, the record is clear that no federal law or question was ever raised prior to this petition.

In all the briefs drafted by the petitioners and during all requests made to the various court levels in the State of California, petitioners never raised any federal law or question.

Petitioners have failed to identify any place in the record where they raised to any court, or where the court may have relied on, any question of federal law. Petitioners merely make vague references to "due process;" however, the arguments being raised now were never raised at any court below.

Rule 14(g)(i) of the Rules of the Supreme Court makes clear what petitioners' obligations are. Pursuant to that rule, the petition must contain a concise statement containing the following:

> (1) specifications of the state in the proceedings, both in the court of first instance and the appellate court, when the federal questions sought to be reviewed were raised;
>
> (2) the method and manner of raising them;
>
> (3) the manner they were passed on by those courts; and
>
> (4) pertinent quotations of the specific portions of the record or summary thereof, with specific references to the places in the

> record where the matters appear, so as to show that the federal question was timely and properly raised, and this Court has jurisdiction to review the judgment on writ of certiorari.

Rule 14(g)(i) of the Rules of the U.S. Supreme Court.

Petitioners have failed to meet the specificity required by Rule 14. Petitioners have not shown with any amount of clarity when and what context a federal question was raised and considered by any state court. The rationale for this deficiency is obvious. No court has ever decided or considered any matter of federal law.

Based upon the foregoing, petitioners have failed to meet their burden under the Rules of the U.S. Supreme Court and the case law which establishes when there is a compelling reason to grant a petition for writ of certiorari. Accordingly, respondent respectfully submits that it would be inappropriate for this Court to exercise its discretion and assume jurisdiction of this case.

II.

PETITIONERS HAVE NOT BEEN DENIED ANY DUE PROCESS RIGHTS.

Respondent properly submitted to the trial court a judgment after the order on the motion for summary judgment was granted. Pursuant to the provisions of the California Code of Civil Procedure, respondent properly gave notice of entry of that judgment. (California Code of Civil Procedure § 664.5.) Once notice is received, there are various things that petitioners could have done in response to the entry of judgment. In fact,

petitioners did attempt to have the judgment set aside. California rules are extremely clear that the time in which an appeal must be filed starts ticking once the Notice of Entry of Judgment has been served. An appeal must be filed within thirty days after Notice of Entry of Judgment has been served. (California Rules of Court, Rule 122.) Once this is done, petitioner clearly knows what his obligations are. There is absolutely nothing stopping him from noticing the appeal. Petitioners merely slept on their rights and failed to diligently pursue his appeal.

The case of *Pennoyer v. Neff*, 95 U.S. 714 (1877), cited and relied upon by petitioners, is much different than the case now being presented. In *Pennoyer*, a party's substantive rights were affected without ever having received notice. Here, petitioners did receive notice; they just decided not to do anything about it.

The lack of notice petitioners complain of has nothing to do with the ultimate result of this case. Perceived lack of notice did not deny petitioners any rights. Petitioners had many options; they could have contested entry of judgment, which they did, or gone forward with the appeal, which they chose not to do.

Thus, respondent respectfully submits that these are additional grounds to support denial of the petition.

CONCLUSION

Petitioners' basis for jurisdiction, and statement and argument in support of granting the petition, are based on assumptions which are simply not supported by the record. By petitioners' own admission, it is by "implication" that the state courts decided an important federal question. (Petition for Writ of Certiorari at p. 5.) Implication is not sufficient. No court in California ever decided a federal question, nor was a federal question ever raised below. There is complete lack of any facts or law to support the existence of jurisdiction of this Court to hear the matter argued by petitioners. There has been no demonstration of any Fifth or Fourteenth Amendment federal questions which were properly raised or decided by any court. Additionally, all actions by the courts below have been reasonable and in accordance with any federal standard argued for by petitioners.

For all of the foregoing reasons, respondent respectfully submits that this petition should be denied.

Respectfully submitted,

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No. 97-238

In The

Supreme Court of the United States

October Term, 1996

JUANA MUNIZ, et al.,

Petitioners,

vs.

COUNTY OF SOLANO,

Respondent.

On Petition for Writ of Certiorari from the Supreme Court of California

PETITIONER'S REPLY TO OPPOSITION

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I. REPLY STATEMENT

In its brief in opposition to MRS. MUNIZ' petition for a writ of certiorari the COUNTY OF SOLANO (Hereinafter referred to as the "COUNTY"), alleges that the Petitioners "merely slept on their rights and failed to pursue their appeal". But in truth, the COUNTY stepped on the rights of MRS. MUNIZ. In doing so MRS. MUNIZ suffered a deprivation of right guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

The COUNTY also avers that MRS. MUNIZ never raised any federal question at any stage of the proceedings below. This is not true. The record below reveals that MRS. MUNIZ stated the "due process" question no less than seven times in her briefings before the California Appellate and Supreme Courts. (See Petition for Writ of Certiorari, Section V, RAISING THE FEDERAL QUESTION at pgs. 11-18). The cases cited hereinbelow make clear that no particular form of words or phrases is necessary to state a federal question so long as it appears by clear and necessary intendment that the question must have been raised.

The COUNTY avers that no court below ever decided any federal question. This is not true

either. The courts below are presumed to have passed upon the "due process" argument under the rules of construction expressed in ***Mullane v. Central Hanover Bank,*** infra, 339 US 306, 70 Sup.Ct. 652, 94 L Ed 865, and line of cases.

The COUNTY wrongfully charges that petitioners' position is that the federal question was raised "by implication". Petitioners' true phraseology was "necessary implication", (Petition for Certiorari, pg. 5) consistent with the "necessary intendment" or "necessary effect" language of the cases cited hereinbelow.

The COUNTY also avers it properly gave notice of the judgment complained of. The only notice of judgment received by MRS. MUNIZ was after the ex parte judgment was obtained. This is not the issue. The issue before this Court is the Unconstitutional deprivation of prior notice of the judgment. In the circumstances of this case the Supreme Court has not decided the question. It is proper indeed that this Court decide the issue raised under the guidelines of Rule 10 (c) of the U.S. Supreme Court Rules. In this connection the COUNTY is here further corrected, to wit: Petitioners did not appeal from any judgment. They appealed from a trial court order *granting*

the COUNTY'S motion for summary judgment and from an order denying MRS. MUNIZ' motion for reconsideration of the order.

The trial court disregarded the covert judgment in its orders. The judgment only became an issue on appeal when the COUNTY hinged all its arguments on the entry of the ignored judgment. At that moment only, in the appeals process, did the deprivation of due process notice become the federal question. It is not a requirement that the federal question be raised in the trial court, so long as it was raised at the appellate level. ***Whitfield v. Ohio*** (1935) 297 U.S. 431, 435-436, 56 Sup.Ct. 532, 533, 80 L Ed 778, 782.

The COUNTY charges that Petitioners due process pleas were merely "vague references". However, every reference below to "due process" was clearly stated in the context of MRS. MUNIZ' deprivation of notice. The words "due process" should ring like a bell of freedom whenever raised in American litigation and should not be so cavalierly dismissed as the COUNTY would like us to do.

II. IS THE QUESTION A FEDERAL ONE?

A. It is sufficient if it appears, *by clear and necessary intendment*, that the federal question must have been raised and must have been decided, in order to have induced the judgment. It is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms.

This proposition is the precedent standard of interpretation. (See, for example, *Bridge Proprietors v. Hoboken L. and I. Co.* (1863) 68 U.S. 116, 142-143, 17 L Ed 571, 576, ; *St. Louis, I. M. & S. R. Co. v. Starbird.* (1916) 243 U.S. 592, 599, 37 Sup.Ct. 462 ,465 , 61 L Ed 917, 922-923. *Green Bay & M. Canal Co. v. Patten Paper Co.* (1898) 172 U.S. 58, 68, 19 Sup.Ct. 97, 101, 43 L Ed 364, 369.

B. *No particular form of words or phrases* has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court.

The standard of review just recited is the prevailing precedent of this Court. (*St. Louis,* supra, 243 U.S. at 599-600, 37 Sup.Ct. at 465; *Dewey v. Des Moines* (1898) 173 U.S. 193, 199, 19

Sup.Ct. 379, 381, 43 L Ed 665, 667; ***Green Bay v. Patten Paper***, supra, 172 U.S. at 67-68, 19 Sup.Ct. at 100, 43 L Ed at 368-369).

In *Bridge Proprietors v. Hoboken L. & I. Co.*, supra, 68 U.S. at 142, 17 L Ed at 575, this Court stated the following:

> "It would be a new rule of pleading and one altogether superfluous to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant, in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the Constitution is the one involved in this case.'"

In the *Bridge* case, supra, the Constitution of the United States is not even mentioned in the record

below. In the *Dewey* case, supra, the Court stated at 173 U.S. 199, 19 Sup.Ct. 381, 43 L Ed 667, the following:

> "if the decision of the [State] Court, ***while not noticing the question,*** was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment ***or that such was its necessary effect*** in law. "[Emphasis added].

C. Ambiguous or obscure adjudications by state courts do not bar the Supreme Court from determining the validity of a federal question. The Supreme Court may assume there is a federal question unless the state court plainly states there are adequate and independent state grounds.

The above rule of interpretation was announced by this Court in its decision *Michigan v. Long,* (1983) 463 U.S. 1032, 1041-1042, 103 Sup.Ct. 3469, 3476-3477, 77 L Ed 2d 1202, 1214-1215.

The California Appellate Court dismissed MRS. MUNIZ' appeal "for good cause appearing" saying nothing else. Yet, MRS. MUNIZ raised her due process lack of notice plea numerous times. She

contends here that when the California Appellate Court dismissed her appeal and when the California Supreme Court denied her petition for review, that her U.S. Constitutional right of due process notice was as a necessary and unavoidable effect adjudicated and denied. She appeals to this Court for help.

III. DUE PROCESS AND PRIOR NOTICE

This Court has held that due process guarantees an "opportunity to be heard". The opportunity must be granted at a meaningful time and in a meaningful manner. This means that notice and the opportunity to be heard must be granted at a time when the deprivation of right can still be prevented.

See *Armstrong v. Manzo* (1965) 380 U.S. 545, 551-552, 85 Sup.Ct. 1187, 1191, 14 L Ed 2d 62, 66. (Meaningful time/meaningful manner); *Fuentes v. Shevin* (1971) 407 U.S. 67, 81, 92 Sup.Ct. 1983, 1994, 32 L Ed 2d 556, 570.

The COUNTY takes the position in its opposition that even if a wrong was done MRS. MUNIZ had many options. MRS. MUNIZ had no options. If she appealed from the judgment she would have

then validated it, which not even the trial court did in its orders. In any event, the trial judge asked for and received a jurisdictional brief addressing the question whether the judge had jurisdiction to rule on MRS. MUNIZ' motion for reconsideration. Hence, the judgment was under attack at the trial level without the necessity of a motion to vacate it, or similar motion, as the COUNTY argues should have been done. When the trial judge ruled on the MUNIZ motion it did so in complete derogation of the improvident judgment and rendered it a nullity.

This Court has held that *no later hearing* can undo an arbitrary taking that has already occurred that was subject to the right of procedural due process. **"This Court has not...embraced the general proposition that a wrong may be done if it can be undone".** This Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided *before* the deprivation at issue takes effect. ***Fuentes, Id.*** 407 U.S. at 82, 92 Sup.Ct. at 199, 532 L Ed 2d at 570-571. As a matter of Constitutional principle, it is no replacement for the right to a *prior* hearing that is the only truly effective safeguard against arbitrary deprivation of property. *Id.* 407 U.S. at 83, 32 L Ed 2d at

572, 92 Sup.Ct. at 1996. Only by "wip[ing] the slate clean" from the judgment will the petitioners be restored to the position they would have occupied had due process been accorded to them in the first place. ***Peralta v. Heights Medical Center, Inc.***, (1988) 485 U.S. 80, 87, 108 Sup.Ct. 896, 900, 99 L Ed 2d 75, 82.

The due process clause at a minimum requires that deprivation of life, liberty or property by an adjudication ***be preceded*** by notice and opportunity for hearing appropriate to the nature of the case. ***Mullane v. Central Hanover B. & T. Co.*** (1949) 339 U.S. 306, 313, 70 Sup.Ct. 652, 656-657, 94 L Ed 865, 873.

> "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce, or contest." ***Id.*** 339 U.S. at 314, 70 Sup.Ct. at 657, 94 L Ed at 873.

MRS. MUNIZ should have been given the opportunity to interpose an objection to the covert bid for judgment before it was ever entered. See ***Mullane, Id.***, 339 U.S. at 314, 70 Sup.Ct. 657, 94 L Ed at 873. MRS. MUNIZ did not get that chance. But she should have.

CLOSING REMARKS

This Court has not meaningfully explored the issue of unnoticed judgments where trial courts have proper jurisdiction over the parties affected, that is where jurisdictional service of process is not in issue. The Court's rulings in *Pennoyer v. Neff* (1877) 95 U.S. 714, 24 L Ed 565 and its progeny of cases were given in the circumstance where there was no in personam jurisdiction over the party charged with judgment. MRS. MUNIZ offers to this Court an opportunity to fashion a rule that could profoundly guide lawyers to model their daily practices in the spirit of fundamental fairness that is the ultimate goal of Constitutional Due Process. To borrow the language of *Peralta v. Heights,* 485 U.S. at 87, supra, the Due Process Clause demands no less in this case.

Petitioners pray that certiorari be granted.

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